No. 88-582 (2)

Supreme Court, U.S.
FILED
OCT 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

MARGO FICAROTTA,

Petitioner,

v.

JOHN P. RENNA, individually and/or Commissioner of Dept. of Community Affairs; WILLIAM M. CONNOLLY, individually and/or as Director of the Division of Housing; RALPH PFLEGER, individually, and/or as Chief Administrator of the Bureau of Housing Inspection; JOHN J. CHERNOSKI, individually and/or as Dept. Atty. General, Dept. of Law and Safety; MARK I. SIMON, individually and/or Dept. Atty. General, Dept. of Law and Safety,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

CARY EDWARDS
Attorney General of
New Jersey
Attorney for Respondents
R. J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8866

JAMES J. CIANCIA
Assistant Attorney General
Counsel of Record

MAUREEN HINCHLIFFE BONNEY
Deputy Attorney General
On the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

HOPP

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Where both the federal and state courts have made findings of fact showing petitioner's claims to be completely without merit, should not this Court decline review?

2. Where no violation of petitioners constitutional rights has been presented, should not this Court decline review?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

COUNTERSTATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 2

A. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE DECISIONS BELOW ARE IN FULL ACCORD WITH THIS COURT'S PRIOR RULING 2

B. NO VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS HAS BEEN PRESENTED AND THUS, THIS CASE DOES NOT PRESENT ANY "SPECIAL AND IMPORTANT REASON" JUSTIFYING REVIEW OF THE DECISIONS BELOW, AS CONTEMPLATED BY RULE 17 OF THE SUPREME COURT 5

CONCLUSION 9

INDEX TO APPENDIX ..... RA i

APPENDIX ..... RA 1

TABLE OF AUTHORITIES

Page

CASES CITED

Allen v. McCurry, 449 U.S. 90 (1980) 6

Baker v. McCollan, 443 U.S. 137 (1979)..... 7

Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911).....3, 6

Hicks ex rel. Feiock v. Feiock, ___ U.S. ___ (1988), 108 S.Ct. 1423 (1988).....2, 3, 4, 5, 6

Shillitani v. U.S., 384 U.S. 364 (1966)..... 3

STATUTE CITED

42 *U.S.C.* §1983..... 1, 7

N.J.S.A. 55:13A-3(k) 4

N.J.S.A. 55:13A-7.1 4

RULES CITED

New Jersey Court Rules, *R.* 1:10-5..... 4

ADMINISTRATIVE CODE

N.J.A.C. 5:10-25.3..... 5

OPINIONS BELOW

The plaintiff, via complaint filed by her former counsel, initiated this action pursuant to 42 *U.S.C.* §1983, claiming five named state officials violated her civil rights. The complaint of plaintiff was originally dismissed, with prejudice, by order of the Honorable Clarkson S. Fisher, then Chief Judge of the United States District Court. (RA 1-2). The plaintiff, acting *pro se*, filed an application for reconsideration. The district court opinion of Judge Thompson found petitioner's claim that she was illegally arrested and imprisoned to be without merit. (PA C-2). Petitioner filed an appeal with the Third Circuit, which was denied (PA A); petitioner's subsequent *en banc* application was also denied. (PA B). Petitioner filed a total of three applications for reconsideration in the district court, which were all denied. (RA 3-4).

Petitioner was a party in state court proceedings concerning some of the same incidents. The Appellate Division of the New Jersey Superior Court filed an opinion which was submitted to the federal courts below. (RA 5-22). One of the points raised by petitioner and decided against her in the state court proceeding was the validity of petitioner's one day incarceration without bail, pursuant to a warrant (PA I) issued upon an Order enforcing Litigant's Rights (civil contempt) (PA G). (See state court opinion, printed in part at PA N and in full at RA 5 to RA 22).

COUNTERSTATEMENT OF FACTS

The petitioner, after a four year refusal to install smoke alarms in her multi-family, low-income housing units was incarcerated by the New Jersey Superior Court upon application of the State Department of Community Affairs. (RA 5 to RA 22). The face of both the warrant and the Order to Enforce Litigant's Rights are plain; petitioner was to be released as soon as she agreed to install the proper smoke detection devices. (PA G-2, PA I-3). She was released within a day, upon her agreement to install the detectors. (PA J3-J4). Petitioner claims the imprisonment, which took place after numerous hearings, notices and appeals, was in violation of her civil rights.

Both federal and state courts have found her contentions of constitutional violations without merit. These full opinions, annexed at Petitioner's Appendix C and Respondents' Appendix 5, further outline the facts as determined by these courts and are adopted herein.

REASONS FOR DENYING THE WRIT

A. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED SINCE THE DECISIONS BELOW ARE IN FULL ACCORD WITH THIS COURT'S PRIOR RULING.

Petitioner improperly relies upon this Court's recent decision in *Hicks ex rel. Feiock v. Feiock*, ___ U.S. ___ (1988), 108 S.Ct. 1423 (1988), in support of her proposition that her one day incarceration was improper. Two separate courts have determined petitioner was arrested pursuant to civil, not criminal, contempt. Both courts determined

petitioner's arrest was to compel her obedience to a court order. (PA at C-7; RA at 19-21).

Petitioner claims her incarceration was criminal contempt and she was not provided with the proper safeguards. (PA B5-B8). The petitioner continues to refuse to recognize the differences in the concepts of civil and criminal contempt. Court imposed conditional imprisonment for the purpose of compelling a litigant to obey a court order has been utilized from the time of the early common law to force recalcitrant litigants to comply with judicial decrees. As previously explained by this Court, it is the character and purpose of the contempt action which render the proceedings civil rather than criminal in nature. *Shillitani v. U.S.*, 384 U.S. 364, 368 (1966). When an act of disobedience consists of *refusing* to do what has been ordered, not in doing what had been prohibited, and the judgment imposes conditional imprisonment to compel obedience, the contempt is defined as civil. *Shillitani v. U.S., supra* at 368; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418 (1911).

> [T]hose who are imprisoned until they obey the order, 'carry the key of their prison in their own pockets.' [*Hicks ex rel. Feiock v. Feiock, supra,* at 1430, quoting from other multiple sources.]

From 1981 until 1985 Margo Ficarotta refused to comply with the Department of Community Affairs regulations requiring proper smoke detection systems in her low-income apartment buildings. (State opinion, at RA 6, RA 14, RA 15). Petitioner had numerous hearings and exemption requests. Her stubborn refusal to comply with fire and safety regulations left the litigants little choice but to request the courts to impose coercive sanctions.

This action is in full accord with this Court's prior rulings, as outlined *supra*.

Feiock reaffirmed the long standing principles for determining classification of the relief imposed in any given proceeding as either civil or criminal in nature. *Id.* at 1429. The distinction between relief that is civil in nature and that which is criminal in nature is properly drawn from an examination of the character of the relief itself. *Id.* at 1430-32. A conditional penalty is civil contempt because the person imprisoned, when they obey the order involved, " . . . carry the keys of their prison in their own pockets . . . *Id.* at 1430. This is the case with petitioner, who, by her own admission, was released as soon as she agreed to comply with the court order. The application of the litigants (PA G) was for the traditional civil contempt remedy available, pursuant to the New Jersey Court Rules. *R.* 1:10-5. The petitioner relies upon one unreported and outdated case, *Thompson,* at PA D; (reprinted in part only), and superceded New Jersey regulations for her contention that her buildings were exempt from the current fire and safety regulations. Her position is incorrect; petitioner's buildings had three stories with three separate dwelling units. (Brief for Petitioner at 16; RA 6, RA 14). Every "multiple dwelling" in New Jersey is required by statute to be equipped with smoke detectors. *N.J.S.A.* 55:13A-7.1. A multiple dwelling is defined by statute to be any building of "one or more stories" with "three or more units of dwelling space". *N.J.S.A.* 55:13A-3(k). The Commissioner of the Department of Community Affairs is empowered by statute to establish regulations governing the type and location of the alarms. *N.J.S.A.* 55:13A-7.1. He has done so in the

New Jersey Administrative Code. *N.J.A.C.* 5:10-25.3. Petitioner's alternative contentions that the regulations are wrong or that she is somehow exempt are without any foundation.

B. NO VIOLATION OF PETITIONER'S CONTITUTIONAL RIGHTS HAS BEEN PRESENTED AND THUS, THIS CASE DOES NOT PRESENT ANY "SPECIAL AND IMPORTANT REASON" JUSTIFYING REVIEW OF THE DECISIONS BELOW, AS CONTEMPLATED BY RULE 17 OF THE SUPREME COURT.

The New Jersey Appellate Division has determined that the judge in state court properly exercised his authority by incarcerating defendant until she agreed to properly install a fire detection system in her low-income housing units. (RA 20-21). This decision was never appealed. State law determinations provide strong guidance to the federal courts as to whether the State is properly exercising its authority. *Feiock, supra,* at 1429. The one challenging the State classification is required to prove the State's characterization of the type of contempt imposed is incorrect as a matter of federal law. Only then can a proper analysis be conducted of the protections afforded by the Due Process Clause and other Constitution protections. *Ibid.*

> When a State's proceedings are involved, state law provides strong guidance about whether or not the State is exercising its authority "in a nonpunitive, noncriminal manner," and one who challenges the State's classification of the relief imposed as "civil" or "criminal" may be required to show "the clearest proof" that it is not correct as a matter of federal law. . . .

* * *

> [t]he critical features are the substance of the proceeding and the character of the relief that the proceeding will afford; 'If it is for civil contempt the punishment is remedial, and for the benefit of the complaint. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court.' *Feiock, supra,* at 1429, quoting *Gompers, supra.*

Thus, the New Jersey Appellate Court's determination that the petitioner was held in civil contempt gives strong guidance to this Court. (RA 5 to RA 22, at RA 20-21). Also, the petitioner's failure to appeal that decision to the New Jersey Supreme Court also suggests that this forum should give preclusive effect to the state court final opinion, attached at RA 5. *Allen v. McCurry,* 449 U.S. 90 (1980). The federal district court opinion did not specifically rely on the New Jersey determination but made a separate determination that petitioner was detained for civil, not criminal contempt. (PA C1 to C10, at C7).

> In this particular case the order obtained by the Commissioner of Community Affairs, State of New Jersey, required Ficarotta to install a certain type of smoke detector. When she agreed to do so she was released from jail.
>
> Ficarotta was not subjected to a criminal contempt proceeding and, therefore, was not entitled to the safeguards which attend such proceedings. Ficarotta's arrest and imprisonment was pursuant to a civil contempt order. [Thompson opinion at PA C-7].

Margo Ficarotta has had four separate reviews of her complaint by the federal district court. (RA 3-4). The Third Circuit affirmed the dismissal of her cause. (PA A; PA B). Petitioner went to the Appellate Division of the

New Jersey Superior Court claiming constitutional violations from her one day incarceration. (RA 5-6). This incarceration was after a full administrative law hearing as to the violations and numerous other notices, motions and appeals, outlined in detail throughout the State court opinion and specifically noted at RA 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21. The petitioner has had all the process that was due. The Fourteenth Amendment does not protect one from all deprivation's of one's liberty; the constitutional protection only guarantees no deprivation will occur without due process of law. *Baker v. McCollan*, 443 U.S. 137, 145 (1979). This inquiry into whether such a deprivation has occurred without due process is a threshold question and in the case at bar, it has been answered. Without such a deprivation no action lies under the civil rights statutes. *Id.* at 140.

> The first inquiry in any §1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and Laws." If there had been no such deprivation, the state of mind of the defendant is wholly immaterial. We think that the respondent has failed to satisfy this threshold requirement of §1983. . . . [*Id.* at 140].

Petitioner's complaint set forth no cause of action against any State defendant and was properly dismissed. The proper application of the formidable power of the court is not the basis for a federal civil rights action where, as here, an arrest was properly conducted.

Petitioner in her *Questions Presented* claims she was improperly arrested because a stay was pending and a supersedeas bond had been posted with the state court. No stay was in effect at the time of Mrs. Ficarotta's incarceration except as to the amount of the fine. Her

applications for a stay of the judgment as to abatement of the safety violations and a stay of the arrest warrant were categorically denied by the state appellate division. (RA 23-26). A stay of judgment was entered for the monetary penalty *only*, effective upon the posting of a bond. (RA 24). The motion for a stay on the abatement of violations was specifically denied. (RA 24). The plaintiff was fully cognizant of this. Her own separate motion requesting a stay of the arrest warrant was also denied. (RA 13, RA 25-26). Thus, this contention is without merit.

Petitioner claims her refusal to install smoke detection devices was legally meritorious. This is incorrect; as noted by the New Jersey Appellate Division, the legal merits have been litigated and decided against petitioner's position. (RA 21-22). Her "legal arguments were thoroughly addressed and reviewed. The problem here is [petitioner's] refusal to accept decisions contrary to [her] contentions." (RA 16).

To respond to the other issues raised by petitioner in her *Questions Presented*, the records of this office have no indication that petitioner ever requested oral argument at any time prior to this Supreme Court petition. Likewise, petitioner has never raised any question as to competency of counsel prior to this petition. Petitioner's contention at question 6 that the federal and state courts are biased because of the presence of the Honorable Judge Morton I. Greenberg, formerly of the New Jersey Court system and now serving as a member of the federal judiciary, is simply not worthy of response. These allegations should not be considered by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

CARY EDWARDS
Attorney General of New Jersey
Attorney for Respondents

By: JAMES J. CIANCIA
Assistant Attorney General
(Counsel of Record)
Division of Law
Hughes Justice Complex
CN 112
Trenton, New Jersey 08625
(609) 292-8567

DATED: October 28, 1988

MAUREEN HINCHLIFFE BONNEY
Deputy Attorney General
On the Brief

INDEX TO APPENDIX

Page

March 18, 1987 Order of Clarkson S. Fisher, U.S.D.J. ..... RA 1

June 3, 1988 Order of Anne E. Thompson, U.S.D.J. ..... RA 3

April 8, 1987 *per curiam* opinion of the New Jersey Superior Court, Appellate Division..... RA 5

July 15, 1985 Order of Neil F. Deighan, J.A.D..... RA 23

October 22, 1985 Order of Morton I. Greenberg, P.J.A.D..... RA 25

W. CARY EDWARDS, ATTORNEY GENERAL OF NEW JERSEY
Attorney for Defendants

By: Maureen Hinchliffe Bonney, Deputy Attorney General
R.J. Hughes Justice Complex, CN 116
Trenton, New Jersey 08625
(609) 984-2924

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MARGO FICAROTTA, Plaintiff, v. JOHN P. RENNA; individually and/or Commissioner of Dept. of Community Affairs, WILLIAM M. CONNOLLY; individually and/or as Director of the Division of Housing; RALPH PFLEGER; individually, and/or as Chief Administrator of the Bureau of Housing Inspection; JOHN J. CHERNOSKI; individually and/or as Dept. Atty. General, Dept. of Law and Safety; MARK I. SIMAN; individually and/or Dept. Atty. General, Dept. of Law and Safety, Defendants.	) Hon. Anne E. Thompson, U.S.D.J. Civil Action No. 86-4909 (AET) ORDER

This matter being opened to the Court by W. Cary Edwards, Attorney General of New Jersey, by Maureen Hinchliffe Bonney, Deputy Attorney General, on behalf of the defendants, and the Court having considered the papers submitted herein, and for good cause shown;

IT IS on this 18th day of March, 1987;

ORDERED that the Complaint of Plaintiff is dismissed, with prejudice.

/s/ Clarkson S. Fisher
Anne E. Thompson (name crossed out) U.S.D.J.
CLARKSON S. FISHER, Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

MARGO FICAROTTA, Plaintiff	: Civil No. 86-4909 (AET)
v.	: *ORDER* (filed Jun 3, 1988)
JOHN P. RENNA, et al., Defendants	:

This matter comes before the court on plaintiff Margo Ficarotta's third motion for reconsideration of this court's Order of March 18, 1987 dismissing plaintiff's complaint with prejudice. Plaintiff's first motion for reconsideration was denied by a Memorandum and Order entered on July 29, 1987. Plaintiff's second motion for reconsideration was denied by an Order filed on October 26, 1987.

In this third motion for reconsideration the plaintiff has presented to the court no new evidence or any other reason justifying relief from this court's order of dismissal as required by FED. R. CIV. P. 60(b). For the reasons set forth in its previous orders and because plaintiff has failed to show any reason why this matter should be reconsidered, plaintiff's motion for reconsideration is denied.

Furthermore, the court orders that plaintiff be barred from filing any further motions for reconsideration of this matter unless plaintiff can show cause that she has met the requirements of FED. R. CIV. P. 60.

It is therefore on this 3rd day of June 1988,

ORDERED that plaintiff's motion for reconsideration be and hereby is denied; and it is further

ORDERED that plaintiff be and hereby is barred from filing any futher motions for reconsideration without showing cause why the motion satisfies the requirements of FED. R. CIV. P. 60.

/s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW
JERSEY
APPELLATE DIVISION
A-5424-84T6

JOHN P. RENNA, COMMISSIONER
OF COMMUNITY AFFAIRS, STATE
OF NEW JERSEY,

Plaintiff-Respondent,

v.

JOSEPH FICAROTTA and
MARGO FICAROTTA,

Defendants-Appellants.

(filed Apr. 8, 1987)

Argued: March 18, 1987 - Decided: Apr. 8 1987

Before Judges King, Deighan and Havey.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County.

Margo Ficarotta, appellant, argued the cause *pro se* for appellants.

Mark I. Siman, Deputy Attorney General, argued the cause for respondent (W. Cary Edwards, Attorney General of New Jersey, attorney; Michael R. Clancy, Deputy Attorney General, of counsel).

PER CURIAM

This appeal raises three issues. As stated by the appellant in her *pro se* brief, they are

> POINT 1 - THE JUDGMENT OF J.S.C. DANIEL O'DONNELL FOR $1,550.00 WAS CLEARLY ARBITRARY, CAPRICIOUS AND ILLEGAL AND SHOULD BE SET ASIDE.

POINT 2 - THE INCARCERATION OF THE APPELLANT WITHOUT BAIL TO MAKE HER INSTALL THE "HARD WIRE" IN HER 3 STORE, 3 APT. BUILDING, WITH THIS APPEAL PENDING AND HAVING POSTED A SUPERSEDEAS BOND FOR MORE THAN PENALTY MONTHS BEFORE, WAS IN FACT CRUEL AND UNUSUAL PUNISHMENT.

POINT 3 - THE LAWS MUST BE ADDRESSED AND CLARIFIED REGARDING WHEN AC ELECTRICAL INTERCONNECTING ALARMS MUST BE INSTALLED. IN COMMON AREAS IN A SMALL MULTIPLE DWELLING WHERE BATTERY OPERATED SMOKE DETECTORS ARE IN APARTMENTS.

We reject all of appellants' contentions and we affirm for the reasons which we give below.

Defendants, the owners of several three-story, three-unit apartment buildings, were directed to comply with plaintiff's regulations which require the installation of interconnected smoke detection systems in common areas of multi-unit dwellings. After defendants failed to secure an administrative exemption from this requirment, plaintiff, the State Commissioner of Community Affairs, imposed statutory penalties on defendants for refusing to abate these violations. Defendants did not appeal the penalties but repeatedly refused to comply with the abatement orders or pay the penalties. Plaintiff initiated this action pursuant to *N.J.S.A.* 55:33A-19(b) seeking in a summary proceeding to recover the penalties imposed in connection with three specified buildings. Defendants now appeal the judgment in plaintiff's favor.

Defendants first contend that the lower court erred by handling plaintiff's action in a summary manner; however, we conclude that their contention that they

were entitled to an evidentiary hearing lacks merit. Defendant, Margo Ficarotta,[1] also argued that the trial judge should have stayed the orders directing her to abate the violations and should not have had her jailed. On the contrary, we believe that commitment as a coercive measure was appropriate under the circumstances.

Defendants also raise a brief argument concerning the substantive regulations themselves and their application to defendants' property. This issue is not properly before us and we refrain from addressing it.

685 Rutherford Avenue:[2]

On November 12, 1981 the Bureau of Housing Inspection of the State Department of Community Affairs, the plaintiff, conducted an inspection of a three-story house located at 685 Rutherford Avenue in Trenton, containing three apartments and owned by defendants. The initial inspector's report noted that defendants had failed to provide alternating current, or AC powered automatic smoke detectors in the dwelling units or in common areas.

---

[1] When used in the singular, the term "defendant" refers to Margo Ficarotta.

[2] Although defendant has included discussion of several different properties which she owns, the State's complaint against her and her husband focused on three specific buildings. For the sake of clarity, we will divide the procedural history to discuss each of these properties separately.

According to plaintiff's susbsequent complaint, the Bureau served defendants with notice of this violation on June 25, 1982. The notice allegedly ordered them to abate these violations within 60 days and advised defendants of their right to contest plaintiff's findings. Defendants never challenged the violation or requested a hearing.

The premises were reinspected on September 9, 1982 and the violations had not been corrected. Therefore, by an order dated January 18, 1983 plaintiff imposed a $200 penalty on defendants for their failure to abate the violations. Plaintiff mailed a notice of the penalty to defendants by certified mail, but after defendants ignored three notices, the post office returned the notice to plaintiff as unclaimed. In light of the failure to effectuate service by certified mail, plaintiff employed substituted service by serving notice of the penalty on the Secretary of State and, on May 2, 1983, posting on the premises a notice directing defendants to abate the violations and pay the penalty.

Plaintiff again inspected the premises on May 24, 1983 and determined that one of the violations had been abated (smoke detectors had been installed in the individual dwelling units) but the second violation (failure to install smoke detectors in common areas) had not been corrected. On February 9, 1984 plaintiff imposed a $1,000 penalty on defendants for continuing an unabated violated. Again, plaintiff was unsuccessful in notifying defendants by certified mail, so notice was filed with the secretary of State on April 12, 1984 and posted on the premises on April 17, 1984.

421 (sic) Monmouth Street:

Defendants also owned a three-story apartment house located at 431 Monmouth Street in Trenton which contained five apartments. Plaintiff inspected the premises on April 1, 1981 and determined that defendants had not provided automatic smoke detectors within the dwelling units and had failed to install an AC powered automatic smoke detection system in the common areas. The record contains a postal receipt bearing defendant's signature and dated June 20, 1981, apparently acknowledging receipt of the notice of the violation at 431 Monmouth Street.

By letter dated November 25, 1981 defendant asked plaintiff for an exemption from the requirement that she install AC powered smoke detectors in the common areas of her buildings. Defendant's request listed ten buildings in Trenton, including 431 Monmouth Street, but it did not include 685 Rutherford Avenue. Defendant contended that she could afford to install only batter(sic)-operated smoke alarms and asked that these be accepted instead of an AC powered system. By a letter dated January 22, 1982 the Bureau of Housing Inspection advised defendant that her request for an exception had been denied.

After denial of the exemption requests, defendants asked for a hearing, and the matter was transferred to the Office of Administrative Law (OAL). After a hearing in June 1982, Administrative Law Judge (ALJ) Reback issued an initial decision on July 30, 1982 recommending

that the denial of defendants' exception requests be sustained. On September 10, 1982 plaintiff John Renna, Commissioner of Community Affairs, issued a final decision adopting the ALJ's decision. Defendants did not appeal the Commissioner's decision.

The property was inspected again on July 15, 1982 and the inspector's report indicates that while other violations had been abated, the violations for failure to install smoke detectors in the common areas remained open. On March 23, 1983 plaintiff assessed a civil penalty of $250 for defendants' failure to abate this violation. According to plaintiff, the postal receipt reproduced in the record demonstrates defendant Joseph Ficarotta's receipt of the notice of this penalty.

152 West Hanover Street:

On August 21, 1981 plaintiff inspected defendant's three-story, three-apartment building at 152 West Hanover Street in Trenton. A postal receipt signed by defendant Joseph Ficarotta and dated October 21, 1981 indicates defendants' receipt of the inspection report advising them that they were to install individual smoke detectors in the dwelling units and an AC powered automatic detection system in the commons areas of the building.

Defendant included 152 West Hanover Street among the properties listed in her exception request, and as discussed above, ALJ's decision in his final decision dated September 10, 1982.

The property was reinspected on November 18, 1982. The inspector found that defendants had abated the violation with regard to individual smoke detectors in the apartments but had not installed an automatic smoke detection system in the common areas. On January 13, 1983 plaintiff imposed a $100 penalty on defendants for failing to abate the violation at 152 West Hanover Street. Upon defendants' failure to accept delivery of the notice of this penalty which had been sent to them by certified mail, notice was filed with the Secretary of State on April 27, 1983 and a notice of the penalty was posted on the premises on May 2, 1982.

740 Centre Street:

After the denial of defendants' request for an exception, they received notice of continuing unabated violations at 740 Centre Street, a property not directly included in this appeal but one which was listed in the exception request. They were ordered to abate the violations and to pay a penalty to plaintiff. Defendants requested a hearing on this penalty, the matter was transferred to the OAL and a hearing was held before ALJ Campbell. Defendants were ordered to pay $750 for failing to install interconnected, AC powered smoke detectors in the common areas, and a $1,000 penalty for each of the three apartments in the 740 Centre Street building. Ultimately, plaintiff adopted the decision of the ALJ upholding the penalties, and, in an earlier appeal, defendants appealed the decision to this court.

On appeal, defendants attempted to reargue the merits of the 1982 decision denying their exception

request. We rejected that and the other arguments raised by defendants. We affirmed the imposition of the penalties except for two of the $1,000 fines imposed for failing to install separate smoke detectors in the first-floor and third-floor apartments. There had been insufficient evidence that these two apartments had been sufficiently inspected to determine whether the violations had been abated, and therefore we affirmed the $750 penalty for noncompliance with the common-areas provisions and the $1,000 penalty for the absence of a smoke detector in the second-floor apartment. The matter was remanded for findings with regard to the absence of smoke detectors in the first- and third-floor apartments, and we retained jurisdiction.

Plaintiff apparently decided not to proceed with the proofs necessary to affirm the vacated penalties, and upon receiving notice of this from plaintiff, we entered an order vacating that portion of our opinion in which we had retained jurisdiction.

The Present Action:

On April 15, 1985 plaintiff filed a complaint containing three counts, one each for 685 Rutherford Avenue, 431 Monmouth Street and 152 West Hanover Street, seeking $1,550 in penalties in accordance with *N.J.S.A.* 55:13A-19 and *N.J.S.A.* 2A:58-1 *et seq.* and *R.* 4:70. Plaintiff also sought an order directing defendants to abate all violations and providing for the assessment of additional civil penalties upon proof of noncompliance.

After two days of hearings on April 26 and May 17, 1985 Judge O'Donnell issued a letter decision in plaintiff's favor on May 29, 1985. The judge affirmed the

imposition of $1,550 in penalties and ordered defendants to abate the violations at 685 Rutherford Avenue within 60 days of the date of an order to be signed. By the time of the judge's decision, defendants no longer owned 152 West Hanover Street or 431 Monmouth Street, so the judge did not order them to abate those violations. A judgment embodying this decision was entered on July 9, 1985.

On July 15, 1985 Judges Dreier and Deighan considered defendants' motion for a stay of the judgment pending certification by or appeal to the Supreme Court. Judge Deighan signed an order granting a stay of the $1,550 judgment conditioned upon the filing of a $2,000 superseadeas bond, but the motion for a stay of the abatement of violations order was denied.

On September 13, 1985 the parties appeared before Judge O'Donnell on the State's motion to enforce litigant's rights. The judge directed that an order be entered giving defendants 30 days to install the required smoke detection system at the Rutherford Avenue address. Upon proof of noncompliance, the judge would issue a warrant for defendants' arrest and subsequent incarceration until the detectors were installed.

Defendant Margo Ficarotta was incarcerated in October 1985. By an order dated October 22, 1985, Judge Greenberg denied defendant's motion for a stay of the arrest warrant. On October 23, 1985 defendant appeared before Judge O'Donnell seeking release. Upon defendant's promise to install the interconnected smoke detection system, the judge agreed to release her from jail. She

was directed to have the work completed within 30 days. The record does not indicate whether she ever complied.

On November 8, 1985 defendant Margo Ficarotta appeared before Judge O'Donnell seeking to vacate his two most recent orders. Judge O'Donnell responded in a letter dated November 12, 1985. He rejected defendant's contention that the State's only remedy was to put the building into receivership and he refused to disturb the original order which had resulted in defendant's incarceration. The State was not compelled to seek the appointment of a receiver and was entitled to enforce the court's order by the usual motion to enforce litigant's rights.

I

The first issue is whether the Law Division judge acted properly by handling plaintiff's complaint in a summary manner and incarcerating defendant for noncompliance with the order.

According to the opinion of the ALJ who considered defendant's exemption request, the properties involved are three-story buildings in Trenton having between three and five dwelling units. They are converted one-family homes with basements. They were described as low-income housing; 98% of defendants' tenants relied on public assistance or social security payments to pay their rent.

Pursuant to *N.J.A.C.* 5:10-19.11(c), plaintiff required that defendants install in the basement and common areas of each floor of the houses an alarm system operated by alternating current that would activate alarms at

every level upon the detection of smoke in any of the locations. Defendants preferred to install direct current, or battery-operated, smoke detectors on each level of the common areas. Since these would not be interconnected, only the individual unit which senses smoke would sound; alarms located in other areas of the buildings would not sound unless smoke independently triggered them. The cost of installing an AC interconnected smoke detection system in each building would range between $1,150 and $2,200, with DC smoke detection systems would cost between $20 and $25 per location.

Of the three buildings involved in the present action, defendants sold two of them – 431 Monmouth Street and 152 West Hanover Street – on February 24, 1984.

In 1981, when defendants were first notified that they would be required to install interconnected smoke detectors in the common areas, defendants owned 11 apartment houses in Trenton. All were approximately the same: converted one-family houses which were three stories high and which had between three and five apartments each. After each of their premises was inspected, defendants filed a request that they be granted exceptions enabling them to install battery-operated individual units in the common areas rather than more expensive AC-operated units. In her request, defendant listed ten of the apartment buildings but, apparently due to inadvertence, failed to list the 685 Rutherford Avenue building. The exception request was submitted to the OAL as a contested case, and, with regard to the ten listed buildings, the matter proceeded in the ordinary administrative manner. The ALJ's recommendation was subsequently adopted by plaintiff.

Defendant now contends in her first point that the summary handling of the present matter was prejudicial to her because she had never been afforded a hearing with regard to 685 Rutherford Avenue, having inadvertently omitted it from her exemption request. In her second point, defendant argues that she should not have been sent to jail for failing to comply with the court's order, and in her third point she argues that there is a need for the law to be "clarified."

Defendants, who have appeared *pro se* throughout the proceedings, have repeatedly complainted of unfair treatment and of incomplete consideration of their cause. However, the record discloses that defendants' arguments have been thoroughly addressed and reviewed. The problem here is defendants' refusal to accept decisions contrary to their contentions. In some instances, defendants have deliberately ignored opportunities for review, only to complain later that the consequences of their own inaction were unfair.

For example, they were afforded a full hearing on their exception claim by ALJ Reback, whose recommendation was later accepted by plaintiff as a final administrative decision. As with any such decision, defendants were entitled to appeal plaintiff's decision to this court pursuant to *R.* 2:2-3(a)(2), but they deliberately chose not to do so, apparently because no penalty had been assessed. Instead, defendants waited until penalties were imposed with regard to the 740 Centre Street property, and then appealed to this court. As in the present appeal, defendants attempted to reargue the merits of the denial of their exemption request, but we rejected their arguments.

The point is that defendants had the opportunity to challenge the merits of the decision on the exemption request, but elected to forego that opportunity. having done so, they have no right to raise substantive issues regarding that decision at this point. That matter is not before us.

Defendants are trying to do the same thing with regard to the 685 Rutherford Avenue property. Technically, that property was not included in the exemption request, and defendants strenuously argue that it was simply by oversight that they neglected to include that property in their request. They seize on this, however, to argue that they were never afforded a hearing on whether that particular property should be exempted, and therefore Judge O'Donnell should have conducted a full hearing on the merits of the propriety of the penalties assessed. Again, the first notice of violation with regard to this property adequately advised defendants of the appropriate remedy, and they availed themselves of that remedy – the opportunity to seek exemption – with regard to all of the other buildings.

Even affording defendants the benefit of the doubt, they cannot deny that they received repeated subsequent notices that the violation remained unabated, but they did nothing. Defendants' vigorous participation in this appeal demonstrates that they knew or could have known what their remedies were, and they are being less than candid now by suggesting at this late date that it was unfair to penalize them with respect to the one property for which they inadvertently failed to request exception.

More to the point, there is absolutely no reason to believe that a full evidentiary hearing with regard to this particular building would serve any constructive purpose. Defendants themselves readily acknowledge that all of their buildings were very similar. In fact, for the purposes of defendants' exemption request, only one building, which was accepted as a representative of all, was inspected. Since defendants readily admit that 685 Rutherford Avenue would have been included in their exemption request had they not forgotten to list it, there is no reason why the building which was inspected for the purposes of evaluating that request was any less representative of that building than all the others. This being so, an evidentiary hearing would not have been useful.

We stress that the present action is not an appeal from the Commissioner's denial of the exemption request or from the penalty assessments. Again, defendants demonstrated their understanding of the availability of appellate review of such penalties when they pursued their initial appeal of the penalties imposed on 740 Centre Street. When similar penalties were imposed for defendants' failure to abate the violations in the three buildings involved in this case, they did not pursue appeals.

Plaintiff acted according to the provisions of *N.J.S.A.* 55:13A-19(b) which describes the permissible penalties for continuing violations and the appropriate means for recovering penalties which are not timely paid. That statute gives the Commissioner the administrative authority to levy and collect penalties and further provides

> . . . where the administrative penalty order has not been satisfied within 30 days of its issuance the penalty may be sued for, and recovered by and in the name of the commissioner in a civil action by a summary proceeding under the Penalty Enforcement Law (*N.J.S.A.* 2A:58-2 et seq.) in the Superior Court. [*N.J.S.A.* 55:13A-19(b)].

Since defendants had not appealed the penalties but nevertheless refused to pay them, plaintiff was authorized to sue. The purpose of this action was to reduce the penalties to judgment; defendants were not entitled to reconsideration of the evidence on the substantive factual issues sustaining the violations themselves. That being so, they were not entitled to more than summary consideration at which plaintiff had to prove only that the penalties had been properly assessed and remained overdue. Plaintiff proved this and was entitled to the judgment. *Community Affairs Department v. Wertheimer*, 177 *N.J. Super.* 595, 600 (App. Div. 1980).

Defendants' second point concerns the judge's decision to incarcerate defendant to coerce her compliance with his order directing the installation of the appropriate smoke-detection systems. Defendant contends that rather than jail her, the judge should have stayed his order pending this appeal. Although this court stayed the portion of the judgment pertaining to the imposition of $1,550 in penalties (conditioned upon the filing of a supersedeas bond), defendant's motion for a stay of the order directing the abatement of the violation was denied by Judge Deighan's July 15, 1985 order.

Defendant was jailed for a brief time and was eventually released upon her promise to comply with the

abatement order. Accordingly, we could deem her argument on this point moot since she is no longer incarcerated. There is apparently no remedy which this court could fashion even if we were ultimately to disagree with Judge O'Donnell's order. However, we conclude that the judge's decision was a proper exercise of his discretion. Given the finality of his judgment and this court's refusal to stay the provision directing the abatement, Judge O'Donnell did have jurisdiction to entertain the State's action to enforce its judgment, regardless of the pendency of this appeal. *See N.J.S.A.* 55:13A-19(b); *Busch v. Busch*, 91 *N.J. Super.* 281, 284-285 (Ch. Div. 1966); *Pressler, Current N.J. Court Rules* (1986), *Comment R.* 1:10-5 at 95.

Pursuant to *R.* 1:10-5, civil contempt is a remedy available to an aggrieved litigant whose opponent has refused to comply with a court order. In the ordinary case, where a court order which is the subject of enforcement proceedings involves only the performance of a single act, as was the case here, confinement until there is performance is an acceptable solution. *Essex County Welfare Board v. Perkins*, 133 *N.J. Super.* 189, 196 (App. Div.), certif. den. 68 *N.J.* 161 (1975). The legal justification for such commitment is to secure compliance with a court order. *Catena v. Seidl*, 65 *N.J.* 257, 262 (1974).

Defendant's subborn (sic) refusal to comply with any of the orders issued in this case is readily apparent. Having tried less severe ways of compelling defendant's performance to no avail, the State properly sought her imprisonment as the last-resort coercive measure. The imposition of monetary penalties obviously had no effect on defendants. Therefore, Judge O'Donnell, having the authority to incarcerate defendant until she agreed to

abate the violations, was justified in taking the action he did. Indeed, his order apparently had the desired effect since defendant soon appeared in court agreeing to comply.

Defendant refers in her point heading to the supersedeas bond she posted, presumably to show that performance would have been completed upon exhaustion of defendant's appellate remedies. However, it is apparent from Judge Deighan's order that the supersedeas bond was required in connection with the stay of the penalty provision of Judge O'Donnell's order. Judge Deighan's order expressly refused to stay the abatement provision, and therefore the supersedeas bond was irrelevant as to that issue. Accordingly, we conclude that the trial judge acted properly when he used incarceration as a means of compelling defendant's compliance with the abatement order.

Defendant's brief third point asks us to "clarify" the law with regard to the necessity of installing interconnected smoke detection systems in three-story buildings. As discussed above, this issue is really not before us. The proper forum for this was either an appeal from the denial of defendant's exemption request or an appeal from the imposition of the penalties. This appeal is neither. We therefore need not reach this point.

In essence, what defendant is doing is disagreeing with the Department's regulations which were adopted pursuant to the Commissioner's authority. Defendant deems plaintiff's requirements "anomalous, unreasonable, inconceivable and absurd." Basically, defendant is

again asking for relitigation of an issue which has consistently been decided against her. She does not want the regulations clarified; she wants them to be invalidated. However, we do not have an appropriate record before us on which to reach this question, even if we were so inclined.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on file
in my office.

/s/ (Illegible)
Acting Clerk

ORDER ON MOTIONS/PETITIONS

A-5118-83T6 M-(ILLEGIBLE)

BUREAU OF HOUSING INSPECTION
DEPARTMENT OF COMMUNITY AFFAIRS,
JOHN P. RENNA,
COMMISSIONER,

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5118-83T6
MOTION NO. M-4947-84
BEFORE PART N

REC'D
APPELLATE DIVI
(Illegible)
/S/ (Illegible)
CLERK

v.

JUDGES: DREIER
DRIGHAN

MARGO FICAROTTA,

MOVING PAPERS FILED July 15, 1985
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT July 15, 1985
DATE ARGUED July 15, 1985
DATE DECIDED July 15, 1985

ORDER

filed Jul 22, 1985

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION/PETITION	GRANTED	DENIED	OTHER
FOR EMERGENT STAY OF JUDGMENT PENDING CERTIFICATION BY OR APPEAL TO SUPREME COURT OF APPEAL NO. 24,096	XX	XX	XX

SUPPLEMENTAL: Motion for stay of judgment for $1,550 granted upon condition of filing $2,000 supersadeas bond. *R.* 2:9-6(a). Motion for stay of abatement of violations denied. *N.J.A.C.* 5:10-35.3; *N.J.S.A.* 53:13A-3(k).

RECEIVED
AUG 1 1985
(ILLEGIBLE)
I hereby certify that the foregoing
is a true copy of the original
on file in my office.
/s/ (Illegible)
Clerk

FOR THE COURT:

/S/ Neil F. Deighan
Neil F. Deighan, Jr., N.J.A.C.

WITNESS, THE HONORABLE Neil F. Deighan, Jr., (XXXXXX) JUDGE OF PART N, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 15 DAY OF July 1985.

/s/ (Illegible)
CLERK OF THE APPELLATE DIVISION

A-5424-84T6 M-607-85

ORDER ON
MOTIONS/(XXXXXX)

JOHN P. RENNA,
COMMISSIONER
DEPARTMENT OF
COMMUNITY AFFAIRS,
STATE OF NEW JERSEY

v.

JOSEPH P. FICAROTTA and
MARGO FICAROTTA.

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5424-84T6
MOTION NO. M-607-85
BEFORE PART F
JUDGES: GREENBERG
COLEMAN
HAVEY

REC'D
APPELLATE DIVISION
OCT 22 1985
/S/ (ILLEGIBLE)
CLERK

MOVING PAPERS FILED OCTOBER 22, 1985
ANSWERING PAPERS FILED _____
DATE SUBMITTED TO COURT OCTOBER 22, 1985
DATE ARGUED OCTOBER 22, 1985
DATE DECIDED OCTOBER 22, 1985

ORDER
(filed Oct 22, 1985)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION/(XXXXXX)	GRANTED	DENIED	OTHER
FOR STAY OF WARRANT		X	

SUPPLEMENTAL:

I hereby certify that the foregoing
is a true copy of the original on file
in my office.
/s/ (Illegible)
Clerk

FOR THE COURT:
/S/ Morton I. Greenberg
MORTON I. GREENBERG, P.J.A.D.

WITNESS, THE HONORABLE MORTON I. GREENBERG, PRESIDING JUDGE OF PART F, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 22ND DAY OF OCTOBER, 1985.

/S/ Elizabeth McLaughlin
CLERK OF THE
APPELLATE DIVISION